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MAJLIS PEGUAM v. CH'NG ENG HING, FRANK

COURT OF APPEAL, PUTRAJAYA
KAMALUDIN MD SAID JCA
HASHIM HAMZAH JCA
COLLIN LAWRENCE SEQUERAH JCA
B [CIVIL APPEAL NO: W-02(A)-704-04-2023]
13 MAY 2024

Abstract – *In a circumstance where the Disciplinary Committee ('DC') has made a finding that a lawyer is guilty under a complaint, the powers accorded to the Disciplinary Board ('DB') is to either affirm or reject the DC's finding. In the event the DB rejects the said finding, the DB may not remit the matter back to the DC for the same to make a finding as to the guilt of the lawyer. The word 'directions' under r. 28 of the Legal Profession (Disciplinary Proceedings) Rules 2017 is limited to only matters that are procedural in nature. The DB is only empowered to make its own finding and then substitute such finding with the DC's finding, thereafter, affording the lawyer the opportunity to be heard.*

LEGAL PROFESSION: *Disciplinary proceedings – Disciplinary Board/Committee – Appeal against decision of High Court ('HC') dismissing order of Disciplinary Board ('DB') – Whether HC erred in its decision – Disciplinary Committee ('DC'), after hearing complaint, did not make definitive ruling as to lawyer's guilt – DB instead of affirming or rejecting DC's decision, directed DC to make finding on lawyer's guilt – Whether DB by remitting matter back to DC committed error of law – Whether DB empowered to direct DC in respect of substantive matter such as finding of guilt – Legal Profession (Disciplinary Proceedings) Rules 2017, r. 28 – Legal Profession Act 1976, s. 103D*

The appellant was the Bar Council of Malaysia, while the respondent was a practicing lawyer. The respondent was appointed by the complainant to represent her in a legal action between her and CIMB Bank. It was not disputed that a sum of RM50,100 was paid by the complainant to the respondent. However, it was not specified whether the said sum was paid by way of a retainer for the specific purpose of initiating legal action against the CIMB Bank or was it in relation to other legal matters involving the complainant, her son and her former companies. This prompted the complainant to inform the respondent that she would handle the legal matter on her own. Subsequently, a complaint was lodged to the appellant by the complainant. The Disciplinary Board ('DB') of the appellant, then appointed the Disciplinary Committee ('DC') to investigate the complaint. After the complaint was heard by the DC, no definitive ruling was made by the DC other than to opine that that there was no clear-cut meaning of the word 'retainer' ('first finding'). Once the first finding was referred to the DB, the

same directed the DC to make a finding on the respondent's liability, pursuant to r. 28 of the Legal Profession (Disciplinary Proceedings) Rules 2017 ('Rules'). Hence, the DC found that the respondent was dishonest and had committed fraud against the complainant. The respondent was found guilty and was imposed with a fine of RM5,000. The respondent was also ordered to render the bill of charges for work done and disbursement incurred and refund the balance of RM50,000 retainer to the complainant ('second finding'). The second finding was affirmed by the DB ('DB's order'). Aggrieved, the respondent filed an originating summons in the High Court to appeal against the DB's order, which was intervened by the appellant. The High Court ('HC'), in allowing the appeal and setting aside the DB's order, held that the DB, by remitting the matter back to the DC, had committed an error of law that warranted an appellate intervention. According to the HC, the 'directions' referred to in r. 28 of the Rules are limited to only matters procedural in nature. They do not concern matters that are substantive in nature, such as the finding of guilt or otherwise. In respect of the first finding, although the DC did not make an affirmative finding of guilt of the respondent, considering that the standard of proof was beyond reasonable doubt, the DB should have taken the first decision as a dismissal of the complaint. It was further found that neither r. 28 of the Rules nor s. 103D of the Legal Profession Act 1976 ('LPA') authorised the DB to remit the matter back to the DC. Hence, the present appeal.

Held (dismissing appeal)
Per Collin Lawrence Sequerah JCA delivering the judgment of the court:

(1) Considering that the DC had made a clear finding that the respondent was not guilty, the powers of the DB was to either reject or affirm the DC's finding as provided for under s. 103D(1) of the LPA. The HC had rightly concluded that, in the event the DB does not agree with the findings of the DC, it should have rejected the finding and substituted it with its own decision in respect of liability and, if it was found necessary to impose any punishment, the DB should have acted pursuant to s. 103D(4) of the LPA and notified the respondent of such intention and accorded him a reasonable opportunity of being heard. Upon a plain and obvious reading of r. 28 of the Rules, the DB could only give directions to the DC on matters of procedural and not substantive nature. As such, the HC had not erred in its finding that the DC had committed an error of law that warranted an appellate intervention. The appeal was therefore dismissed with no order as to costs. (paras 58-63)

Legislation referred to:
Legal Profession Act 1976, ss. 100(1)(b)(i)(ii), 103D(1), (3), (4)
Legal Profession (Disciplinary Proceedings) Rules 2017, r. 28

A *For the appellant - Ong Eng Hong; M/s Rahmat Lim & Partners*
For the respondent - Verghese Aaron Mathews & Khor Chai Hoong; M/s Tang, Khor & MP Leong

[Editor's note: For the High Court judgment, please see Ch'ng Eng Hing, Frank v. Tok Tiak Hoong; Majlis Peguam (Intervener) [2023] CLJU 1280; [2023] 1 LNS 1280
B *(affirmed).]*

Reported by Syamim Ariffin

JUDGMENT

C **Collin Lawrence Sequerah JCA:**

Introduction

[1] This is the appellant's/intervener's appeal against the decision of the learned High Court Judge ("HCJ") on 27 March 2023 in allowing the appeal
D against the appellant's order dated 26 February 2023.

[2] This appeal relates to the power of the appellant (disciplinary board) ("DB") in directing its disciplinary committee ("DC") to make a finding on the respondent's liability *vide* a letter dated 19 April 2019 pursuant to r. 28 of the Legal Profession (Disciplinary Proceedings) Rules 2017 ("2017
E Rules").

Background Facts

[3] The pertinent facts that led to this appeal emanate from the appointment of the respondent who is a practicing lawyer and was appointed
F by the complainant, Tok Tiak Hoong ("the complainant") to handle a legal matter against CIMB on her behalf.

[4] There is no dispute that the complainant paid the sum of RM50,100 to the respondent.

G **[5]** There exists a dispute as to whether the said sum was paid by way of a retainer for the specific purpose of initiating legal action against CIMB or whether it was also in relation to other matters involving legal matters relating to the complainant, her son and her former companies, Hock Sang Realty and Hock Sang Travel Centre (M) Sdn Bhd.

H **[6]** On 18 November 2016, the complainant informed the respondent that she will handle her legal matters and her companies' legal matters on her own.

[7] The complainant subsequently lodged a complaint against the respondent through a letter dated 12 February 2017 to the Advocates and
I Solicitors Disciplinary Board ("DB") of the appellant, which was registered as Complaint No. DB/17/0093.

[8] The DB then issued a letter dated 2 June 2017 to the respondent and requested for an explanation from him pursuant to s. 100(1)(b)(i)(ii) of the Legal Profession Act 1976 ("LPA").

[9] On 16 June 2017, the respondent submitted his written explanation to the DB.

[10] On 6 July 2017, the DB requested the complainant to submit the response to the respondent's written explanation, but the complainant did not respond.

[11] On 11 January 2018, the DB appointed a disciplinary committee ("DC") to investigate the complaint pursuant to s. 103A of the LPA.

[12] On 13 March 2018, the DC proceeded with the hearing of the complaint ("the DC hearing") but did not make any definitive ruling ("first finding") but instead stated as follows:

> There is no 'clear cut' of the meaning of retainer. Subject to DB['s] ruling.

[13] The matter was then referred to the DB. On 19 April 2019, the DB directed the DC to make a finding on the respondent's liability. The letter, which was addressed to the Chairman of the DC, *inter alia*, stated as follows:

> Hence, pursuant to Rule 28 of the Legal Profession (Disciplinary Proceedings) Rule 2017, the Board hereby directs your Committee [to] make a finding on the respondent's liability and if so find liable, to make the appropriate recommendation on punishment pursuant to Section 103C of the Legal Profession Act, 1976.

[14] The DC then reconvened as directed by the DB.

[15] On 20 January 2020, the DC found that the respondent was dishonest and committed fraud against the complainant. It accordingly held that the respondent was guilty and imposed a fine of RM5,000 on him.

[16] The DC further ordered the respondent to render the bill of charges for work done and disbursement incurred and refund the balance of the RM50,000 retainer to the complainant ("the second finding").

[17] On 4 February 2022, the DB wrote to the respondent stating:

(i) the DB was of the view that the DC Chairman could not rely on an inference that just because a sum of RM50,000 had been paid as the retainer, then the respondent had committed fraud;

(ii) there was no solid evidence to suggest that any fraud had been committed, bearing in mind that the standard of proof in disciplinary proceeding is beyond reasonable doubt;

(iii) there was no finding by the DC as to whether the RM50,000 paid to the respondent was a consultant fee or for the commencement of legal action until its conclusion, except to conclude that it was meant as a retainer sum for litigation matters; and

A (iv) there was no bill of cost produced by the respondent to the complainant, although the receipt for payment stated that it was for "litigation".

[18] The DB then directed the respondent to appear before it on 26 February 2022. The respondent duly attended.

B **[19]** On the same day, the DB issued the following order under s. 103D of the LPA ("the DB order"):

> In the exercise of powers by Section 103D of the Legal Profession Act (the Act), the Disciplinary Board having on 26 February 2022, considered the report made by the Disciplinary Committee, the written submission
C from the respondent dated 18 February 2022, affirmed the Disciplinary Committee's finding of liability and recommendation on punishment for fine and upon hearing the respondent together with Mr Verghese Aaron Mathews, the counsel for the respondent pursuant to Section 103D(2) and Section 103D(4) of the Act, IT IS HEREBY ORDERED pursuant to Section 103D(1) of the Act, the respondent do pay a fine of Ringgit
D Malaysia Five Thousand (RM5,000.00) only payable to the Discipline Fund within one (1) month from the date of this Order AND IN DEFAULT THEREOF Section 103(1) of the Act shall apply.

[20] Pursuant to that, the respondent filed an originating summons ("OS") to appeal against the said DB order.

E **[21]** The Bar Council filed an application to intervene in the OS.

[22] On 9 August 2022, the learned High Court Judge ("HCJ") allowed the application to intervene, there being no objection from the parties."

Findings Of The High Court

F **[23]** The HCJ's focus was whether the procedure adopted by the DB when it remitted back the matter to the DC and directing the DC to make a finding on the respondent's liability and in recommending punishment in the event the respondent was guilty, was correct in law.

G **[24]** The HCJ did not find the appellant's argument that pursuant to r. 28 of the Legal Profession (Disciplinary Proceedings) Rules 2017 ("2017 Rules"), the DB is empowered to do so, to be tenable.

[25] Rule 28 provides as follows:

> The Disciplinary Board may give such directions to the Disciplinary
H Committee on matters of procedures as the Disciplinary Board think fit.

[26] The HCJ held that the "directions" referred to in r. 28 are limited to matters of procedures. They do not concern matters of a substantive nature, such as the finding of guilt or otherwise.

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[27] The HCJ found that the DC, in its first finding, did not make an affirmative finding of guilt of the respondent and that in itself is a decision that the DB should have acted upon under s. 103D of the LPA.

[28] The HCJ also said that given that the standard of proof is beyond reasonable doubt, the DB ought to have the finding as a dismissal of the complaint.

[29] The HCJ thus concluded that the DB had committed an error when in its in its letter dated 19 April 2019 to the DC it stated that "your Committee did not make a finding as to whether the respondent is liable or otherwise".

[30] The HCJ held further that neither r. 28 of the 2017 Rules nor s. 103D of the LPA authorises the DB to remit the matter to the DC.

[31] Section 103D(1) of the LPA allows the DB to make an order affirming or rejecting the finding of the DC. If the DB rejects the finding of the DC, the DB shall record the reason for the rejection. Section 103D(3) provides that where the DB disagrees with the finding of the DC, the DB shall make such other order as it deems just.

[32] In any event, the HCJ said, it does not provide for the matter to be remitted back to the DC as if this were the case, it would result in no end to the complaint.

[33] The HCJ finally held that if the DB was not agreeable with the findings of the DC, what it should have done is to reject the finding and substitute it with its own.

[34] If, after substituting it with its own decision on the issue of liability, and finding it necessary to impose any punishment, then under s. 103D(4), it shall notify the respondent of its intention to do so and give him a reasonable opportunity to be heard.

[35] The HCJ therefore held that the DB had committed an error of law that warranted appellate intervention and, in the premises, allowed the appeal by the respondent and set aside the DB order.

Parties' Submissions

Appellant

[36] In summary, the appellant assailed the findings of the HCJ on the grounds that it treated the DC's first report dated 13 March 2018 as a "first finding" when it was not.

[37] The appellant submitted that the DC's report dated 13 March 2018 was not a finding on liability but that the DC were just stating their reasons for the need to refer the matter to the DB for a ruling in respect on "retainer"

A **[38]** It was thus contended that there was a misdirection by the HCJ when he failed to direct his mind to the fact that at the time of the issuance of the letter dated 19 April 2019 no finding was in fact made by the DC.

[39] The appellant also submitted that on the merits of the complaint, the complainant had satisfied the required burden of proof when it was clear that
B the respondent had failed to obtain a sanction from the insolvency department for the complainant to institute legal action despite knowing that the complainant was an undischarged bankrupt.

[40] The appellant's further said that the respondent did not furnish the
C complainant with any legal opinion, written or oral to appraise the complainant of her legal position.

[41] The burden had thus shifted to the respondent to prove that the sum of RM50,100 was for a retainer fee for other litigation matters apart form that against CIMB Bank.

D **[42]** The appellant also submitted that the HCJ had erred in construing r. 28 of the 2017 Rules to be limited to matters of procedure and not matters of a substantive nature.

Respondent

E **[43]** The respondent submitted that the plain wordings of r. 28 of the 2017 Rules clearly deals only with matters of procedure. As the purpose of the remit back to the DC by the DB was on a matter of a substantive nature, it contravened the scope of r. 28.

[44] The respondent further submitted that given that the standard of proof
F for misconduct was beyond reasonable doubt, the DC first findings that there is clear ruling regarding the retainer and thus making it improper and unsafe for the DC to issue any ruling against the respondent, ought to have treated as absolving the respondent from culpability.

G **[45]** The respondent also submitted that it made no sense for the DB's second findings to conclude after approximately two years had elapsed, that the respondent had acted dishonestly and had committed fraud when no new evidence was presented after the first find by the DC.

[46] Finally, the respondent submitted that the purpose of the sum of
H RM50,000 was in fact for a retainer to act for all of the legal matters involving the complainant which included review of documents, attendance at meetings with the KWSP, insolvency offices and travel between Kuala Lumpur and Johor Bahru and not just to file an action against CIMB Bank.

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Analysis And Findings

[47] As stated at the outset, the HC's focus was whether the procedure adopted by the DB when it remitted back the matter to the DC and directing the DC to make a finding on the respondent's liability and in recommending punishment in the event the respondent was guilty, was correct in law.

[48] This was also recognised in the submission filed by the appellant which stated in no uncertain terms that the decision of the HC was grounded predominantly on its finding that the DB, in remitting the matter to the DC through its letter dated 19 April 2029 had committed an error of law.

[49] It is also pertinent to note that from a summary of the memorandum of appeal filed by the appellant, their appeal is premised upon the argument that the HCJ had erred on two counts, firstly, in considering the DC's first report dated 13 March 2018 as a "first finding" and secondly, in deciding that the phrase "directions" under r. 28 of the 2017 Rules are limited to matters of procedure.

[50] Our analysis will therefore address these points raised.

[51] The grounds of judgement of the HCJ showed that he had carefully set out and analysed r. 28 and correctly concluded that the phrase "directions" in r. 28 were by virtue of their ordinary and plain reading, limited to matters of procedure only.

[52] The HCJ opined that the said rule did not at all deal with matters of a substantive nature. He held accordingly that these did not concern the question of whether the respondent was guilty or otherwise.

[53] The HCJ then referred to the grounds as stated by the chairman of the DC and rightly concluded that it was apparent that the DC had decided that the respondent was not guilty of the charges levelled against him.

[54] The HCJ said that the finding made by the DC was of itself a decision that the DB ought to have acted upon under s. 103D of the LPA.

[55] The HCJ also correctly concluded that given that the standard of proof was beyond reasonable doubt, the DB at the very least, ought to have taken the finding of the DC as a dismissal of the compliant.

[56] The HCJ thus correctly found that the DB had committed an error when by way of its letter to the DC of 19 April 2019, it stated "your committee did not make a finding as to whether the respondent is liable or otherwise".

[57] The DB had no powers accorded to it to remit the matter back to the DC in respect of a substantive finding whether of guilt or otherwise.

[58] The DC had made a clear finding of not guilty in respect of the respondent.

A **[59]** Once the DC had made such a finding, the powers of the DB was either to reject or to affirm the finding as provided for under s. 103D(1) of the LPA.

[60] The HCJ thus concluded, and rightly so, in our considered view that if the DB was not agreeable with the findings of the DC, it should have rejected the finding and substitute it with its own decision in respect of
B liability and if, it found it necessary to impose any punishment, to act pursuant to s. 103D(4) and notify the respondent of such intention and accord him a reasonable opportunity of being heard.

[61] After hearing and considering submissions both oral and written, our unanimous findings is that it is clear upon a plain and obvious reading of
C r. 28 of the 2017 Rules that the DB may only give directions to the DC on matters of procedure and not in respect of matters of a substantive nature.

[62] The HCJ had not therefore erred in finding that the DC had committed an error of law that warranted appellate intervention.

D **[63]** In the premises, we dismissed the appeal with no order as to costs.

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